

Issue: Group III Written Notice with Termination (threats/coercion); Hearing Date: 04/27/17; Decision Issued: 04/28/17; Agency: Radford University; AHO: Carl Wilson Schmidt, Esq.; Case No. 10996; Outcome: No Relief – Agency Upheld.



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10996

Hearing Date: April 27, 2017

Decision Issued: April 28, 2017

PROCEDURAL HISTORY

On February 21, 2017, Grievant was issued a Group III Written Notice of disciplinary action with removal for threats or coercion.

Grievant timely filed a grievance to challenge the Agency's action. The matter proceeded to hearing. On April 10, 2017, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On April 27, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Agency Party Designee
Agency Representative
Witnesses

ISSUES

1. Whether Grievant engaged in the behavior described in the Written Notice?
2. Whether the behavior constituted misconduct?

3. Whether the Agency's discipline was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

Radford University employed Grievant as a Trades Technician III. He began working for the Agency in 2014. Grievant was highly regarded by Agency managers for his skills as a plumber. No evidence of prior active disciplinary action was introduced during the hearing.

Grievant was informed on his 2015 annual performance evaluation that "Attitudes and aggressive behavior will not be tolerated."¹

Grievant was assigned to carry keys that opened numerous doors through the Campus. He was supposed to keep the keys secured or under his control. On February 14, 2017, Grievant left his keys and identification badge on top of a bank of lockers. Another employee found the keys and brought them to the Manager. On the following day, the Manager spoke with Grievant and told him to keep his keys on his person, give them to a supervisor, or lock them in a locker. Grievant was told that leaving his keys out was unacceptable.

On February 15, 2017, Grievant was in the Shop with Mr. H, Mr. F, and Mr. M. Grievant said, "If I catch anyone touching my keys, I will break their fingers!" He immediately looked at Mr. F and Mr. H. Mr. H, Mr. F, and Mr. M heard Grievant's comment and felt he was serious. Grievant's demeanor was "serious" when he made the statement. He was not "joking." Mr. F and Mr. H felt threatened by Grievant's

¹ Agency Exhibit 6.

statement because he was serious when he made them and he looked directly at them immediately after making his threat.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses “include acts of minor misconduct that require formal disciplinary action.”² Group II offenses “include acts of misconduct of a more serious and/or repeat nature that require formal disciplinary action.” Group III offenses “include acts of misconduct of such a severe nature that a first occurrence normally should warrant termination.”

“[T]hreatening others” is a Group III offense.³ On February 15, 2017, Grievant threatened to break the fingers of anyone who took his keys. He looked immediately at two co-workers to indicate he was speaking about them. These employees felt threatened by Grievant’s statement. The Agency has presented sufficient evidence to support the issuance of a Group III Written Notice. Upon the issuance of a Group III Written Notice, an agency may remove an employee. Accordingly, Grievant’s removal must be upheld.

Va. Code § 2.2-3005.1 authorizes Hearing Officers to order appropriate remedies including “mitigation or reduction of the agency disciplinary action.” Mitigation must be “in accordance with rules established by the Department of Human Resource Management”⁴ Under the *Rules for Conducting Grievance Hearings*, “[a] hearing officer must give deference to the agency’s consideration and assessment of any mitigating and aggravating circumstances. Thus, a hearing officer may mitigate the agency’s discipline only if, under the record evidence, the agency’s discipline exceeds the limits of reasonableness. If the hearing officer mitigates the agency’s discipline, the hearing officer shall state in the hearing decision the basis for mitigation.” A non-exclusive list of examples includes whether (1) the employee received adequate notice of the existence of the rule that the employee is accused of violating, (2) the agency has consistently applied disciplinary action among similarly situated employees, and (3) the disciplinary action was free of improper motive.

Grievant argued that the Agency did not discipline other employees who engaged in behavior that would otherwise justify the issuance of disciplinary action. Grievant must show that a similarly situated employee did not receive disciplinary action. A similarly situated employee would be one who had threatened others but not been removed from employment. Grievant, however, failed to present any credible

² The Department of Human Resource Management (“DHRM”) has issued its Policies and Procedures Manual setting forth Standards of Conduct for State employees.

³ See, Attachment A, DHRM Policy 1.60.

⁴ *Va. Code § 2.2-3005.*

evidence of another employee who made a threat of physical harm and was not then removed from employment.

Grievant asserted that the Agency took disciplinary action against him because he had complained about improper behavior by other employees. No credible evidence was presented to show the Agency's motive for taking disciplinary action was improper. The evidence showed that the Agency took disciplinary action because of Grievant threatened other employees.

In light of the standard set forth in the Rules, the Hearing Officer finds no mitigating circumstances exist to reduce the disciplinary action.

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group III Written Notice of disciplinary action with removal is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.⁵

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.